85-1512

Supreme Court, U.S.
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No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DANNY E. HILL, 47TH DISTRICT ATTORNEY
OF TEXAS, IN HIS OFFICIAL CAPACITY AS
A DISTRICT ATTORNEY IN THE STATE OF
TEXAS AND AS CLASS REPRESENTATIVE
OF THE DEFENDANT CLASS OF ALL CITY,
COUNTY AND DISTRICT ATTORNEYS
IN THE STATE OF TEXAS,
AND THE DEFENDANT CLASS,

Cross-Petitioners (Respondents),

v.

DONALD F. BAKER,

Cross-Respondent (Petitioner).

Respondents,

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CROSS-PETITION FOR WRIT OF CERTIORARI

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March 5, 1986

QUESTIONS PRESENTED*

1. Whether the Fifth Circuit erred in affirming Petitioner's standing to bring this action, and whether a case or controversy exists which would give this Court jurisdiction over this matter?

2. Whether the Fifth Circuit should have allowed the State of Texas to reenter the case as a party, if the court did so, when the State, by and through its Attorney General, initially filed a Notice of Appeal and then withdrew the State's appeal of the district court's judgment?

3. Whether the State of Texas was a proper party-intervenor at the *en banc* appeal level?

4. Whether the State of Texas was a proper party-intervenor at the trial court level and, thus, entitled to participate in the proceedings before the district court and on appeal?

5. Whether the Attorney General has waived or is estopped from asserting any right to challenge Hill's status as a defendant and appellant in this action?

6. Whether this case must be dismissed for failure to join or obtain judgment against the true party defendant?

7. Whether, irrespective of the Fifth Circuit's approval of Hill's motion to intervene and be substituted as the class representative on appeal, as an existing party-defendant and defendant-class

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*In compliance with S.Ct. Rule 21.1(e)(iii), Hill's counsel certifies that he received the Petitioner's Petition for Writ of Certiorari from Petitioner's counsel of record on February 5, 1986.

In accordance with S.Ct. Rule 21.1(b), Hill notes that all parties to the Fifth Circuit judgment sought to be reviewed are: Donald F. Baker, appellee, Danny E. Hill, 47th District Attorney of Texas in his official capacity as a member of the Defendant-class and as class the representative of the Defendant-class, and the Defendant-class (hereinafter collectively referred to as "Hill"), appellants. The State of Texas sought leave to intervene after previously withdrawing the State's appeal, but formal action was never taken by the Fifth Circuit on that request. The Texas Attorney General has assumed that the State was an intervenor before the Fifth Circuit. Neither the State of Texas nor the Texas Attorney General were legitimate parties before the Fifth Circuit Court of Appeals.

member, Hill had the right and ability to file a Notice of Appeal and carry forward the appeal for and on behalf of himself and the defendant-class (i) when the class representatives appointed by the district court failed to give the class members notice that they would not appeal on behalf of the class, or (ii) when the defendant-class is not given notice and the opportunity to object to a settlement by the State of Texas resulting in a contemplated dismissal of the appeal?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE CROSS-PETITION	9
I. THE FIFTH CIRCUIT ERRED IN CONCLUDING THAT BAKER HAS STANDING TO PROSECUTE THE PRESENT ACTION	9
II. THE FIFTH CIRCUIT ERRED IN PERMITTING THE ATTORNEY GENERAL TO REENTER THE CASE ON HEARING *EN BANC*	14
A. The Attorney General of Texas Voluntarily Withdrew The State's Appeal and Ceased To Be a Party	14
B. The State has Judicially Admitted Its Withdrawal and Refusal to Participate in The Appeal of this Case	15
C. The Fifth Circuit's Implicit Permission Allowing the State to Intervene as a Party, or Participate as An Amicus Curiae, at the *En Banc* Level Was Improper and Untimely After the State Voluntarily Withdrew Its Appeal and Ceased to be an Appellant	15

Page

D. If the Court Concludes That the Fifth Circuit Implicitly Granted the Attorney General's Informal Request to Intervene on *En Banc* Appeal, Such Implicit Grant Was Erroneous 16

1. Section 2403(b) Intervention 17

(a) Was an Officer or Employee of the State Already a Party? 17

(b) The State May Intervene Only to Support the Constitutionality of the Statute 19

2. Permissive Intervention 20

E. Baker's "Real Party in Interest" Claims are Misplaced Under Rule 17 and Have Been Waived Under Rule 9. The Fifth Circuit Should Have Dismissed the Attorney General from the Case Because He Was Not the Real Party in Interest 21

III. THE ATTORNEY GENERAL WAS NOT A PROPER PARTY-INTERVENOR AT THE TRIAL COURT LEVEL, AND THE FIFTH CIRCUIT SHOULD HAVE DENIED THE ATTORNEY GENERAL'S PARTICIPATION ON THAT GROUND 22

A. Section 2403(b) Intervention 22

B. Other Intervention 23

IV. IF THE RIGHT TO PRIVACY OR THE EQUAL PROTECTION CLAUSE APPLIES TO CONDUCT PROSCRIBED BY §21.06, COMPELLING STATE INTERESTS OF MORALITY, HEALTH, AND SAFETY JUSTIFY THE STATUTE 24

A. Morality and Decency: Homosexual Sodomy is Per Se Immoral and Indecent 24

Page

B. Public and Private Health is Threatened by Homosexual Practices 25

V. HILL'S BRANDEIS-BRIEF LEGISLATIVE-FACT EVIDENCE SHOULD HAVE BEEN FORMALLY ADMITTED AND CONSIDERED ON APPEAL 27

CONCLUSION 29

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

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	Page
Allen v. Wright, ___ U.S. ___, 82 L.Ed.2d 556, 104 S.Ct. 3315 (1984)	10, 11, 12
Baker v. Carr, 369 U.S. 186 (1962)	10
Baker v. Wade, 743 F.2d 236 (5th Cir. 1984)	*passim*
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Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds*, 401 U.S. 989 (1971)	24
Childers v. Dallas Police Department, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982)	24
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Flast v. Cohen, 392 U.S. 83 (1968)	10

Page

Garcia v. Laughlin, 155 Tex. 261, 285 S.W.2d 191 (1955) 18

Garner v. Louisiana, 368 U.S. 157 (1961) 28

Golden v. Zwickler, 394 U.S. 103 (1969)..... 10

Gurley v. Rhoden, 421 U.S. 200 (1975) 25

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Ivey v. Daus, 181 F. Supp. 793 (S.D.N.Y. 1960).. 22

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Kahn v. Sherin, 446 U.S. 351 (1974) 28

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Los Angeles v. Lyons, 461 U.S. 95 (1983) 10, 11

Marks v. Brucker, 434 F.2d 897 (9th Cir. 1970).. 22

Mishkin v. New York, 383 U.S. 502 (1966)..... 24

Muller v. Oregon, 208 U.S. 412 (1908) 28

New York v. Uplinger, 104 S.Ct. 2332 (1984).... 19

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 24

Prince v. Massachusetts, 321 U.S. 158 (1944).... 25

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	Page
Roe v. Wade, 410 U.S. 113 (1973)	24
Rummel v. Estelle, 445 U.S. 263 (1980)	28
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State v. Gary, 163 Tex. 565, 359 S.W.2d 456 (1962)	18
Steffel v. Thompson, 415 U.S. 452 (1974)	10, 11, 13
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	10
Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982)	19
Welch v. State Dept. of Highways, ___ F.2d ___, 54 U.S.L.W. 1126 (5th Cir. 1986) (*en banc*)	25
Younger v. Harris, 401 U.S. 37 (1971)	10

	Page
TEXAS CONSTITUTION:	
Tex. Const. art. 5, §21	2, 17, 18
FEDERAL STATUTES:	
28 U.S.C. §2403(b)	*passim*
28 U.S.C. §1254(1)	2
TEXAS STATUTES:	
Texas Penal Code §21.01	2
Texas Penal Code §21.06	*passim*
Tex. Code Crim. Proc. Ann. art. 2.01, 2.02 (Supp. 1982)	2, 17, 18
RULES OF THE SUPREME COURT OF THE UNITED STATES:	
Rule 19.5	2
Rule 20.5	2
FEDERAL RULES OF PROCEDURE:	
Fed. R. Civ. P. 9	21
Fed. R. Civ. P. 17(a)	21
Fed. R. Civ. P. 17(b)	21
Fed. R. Civ. P. 17(c)	21
Fed. R. Civ. P. 23(b)	3
Fed. R. Civ. P. 24	20, 23
Fed. R. App. P. 32(a)	15
Fed. R. Evid. 201, Advisory Committee Notes to §§(a)	28

Page

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Page

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	Page
Marmor et al., *Risk Factors for Kaposi's Sarcoma in Homosexual Men*, 1 LANCET 1083 (1982) .	25
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Three Judge Court Act, Pub. Law 94-381	18

No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, ET AL.,

Respondents,

DANNY E. HILL, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This Cross-Petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, which is reported at 769 F.2d 289, and reprinted as Baker Appendix A, only upon the condition that the Petition for Certiorari is granted in either No. 85-1251 or No. 85-1225.[1] The

[1]There are two Petitions for Writ of Certiorari pending before the Court with respect to the Fifth Circuit's *en banc* decision reported at 769 F.2d 289. Action No. 85-1225 was filed by the Donald F. Baker against Henry Wade, et al. A similar and companion Petition for Writ of Certiorari was filed by the State of Texas against Danny E. Hill and is referenced as No. 85-1251.

For the convenience of the Court and parties, references to the "Baker Appendix" refer to the appendix filed in the Petition for Certiorari in No. 85-1225, and references to the "App." refer to the appendix of Respondents filed with their Cross-Petition to No. 85-1251, which has been assigned No. 85-1412.

supplemental opinion of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, denying Appellant's Petition for Rehearing En Banc is reprinted as Baker Appendix F. The original decision of the Fifth Circuit panel is reported at 743 F.2d 236 and reprinted as Baker Appendix E. The memorandum opinion of the United States District Court for the Northern District of Texas, Dallas Division, (Buchmeyer, J.) is reported at 553 F. Supp. 1121 and reprinted as Baker Appendix B. The final judgment of the District Court entered on September 30, 1982 is reprinted as Baker Appendix C. A supplemental opinion of the District Court is reported at 106 F.R.D. 526 and reprinted as Baker Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting *en banc*, was entered on August 26, 1985. A Petition for Rehearing was denied on October 23, 1985. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1). The jurisdiction of this Court to hear Respondent's Cross-Petition is invoked under Rules 19.5 and 20.5 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions

Texas Constitution art. 5, §21 is reproduced at App. 11.

B. Statutes

28 U.S.C. §2403(b) is reproduced at App. 10.

Texas Penal Code §§21.01 and 21.06 are reproduced at App. 8 and 9 respectively.

Texas Code of Criminal Procedure art. 2.01 is reproduced at App. 12.

STATEMENT OF THE CASE

This Cross-Petition involves the standing of a homosexual to attack the constitutionality of §21.06 of the Texas Penal Code and

to seek an injunction against all district, county and city attorneys in the State of Texas prohibiting them from enforcing §21.06. This Cross-Petition also involves the rights of the defendant-class and individual defendant-class members to bring meritorious appeals of adverse judgments of district courts in their individual behalf as officers of the State and on behalf of the defendant-class if the class representatives refuse to appeal or the appeal is compromised by a third-party who is not a member of the defendant-class.

The petitioner, Donald F. Baker ("Baker"), a homosexual, sued a defendant-class consisting of all district. county and city attorneys in the State of Texas and sought a declaration that §21.06 of the Texas Penal Code violated his right of privacy, the equal protection clause and the establishment of religion clause of the United States Constitution. Baker has never been arrested, convicted or threatened with arrest or conviction under §21.06 of the Texas Penal Code. The Texas Human Rights Foundation, a nonprofit corporation engaged in promoting homosexuals' interests, hired Petitioner's counsel and funded this action. (R. Vol. VI at 47-48.) Baker was selected by the Texas Human Rights Foundation to file this suit. Baker was not obligated to pay any costs or attorneys' fees incurred on behalf of his own counsel. (R. Vol. VI at 47.)

The trial court certified the defendant-class pursuant to Fed. R. Civ. P. 23(b)(2) (R. Vol. I at 204-205). Henry Wade, District Attorney for Dallas County, and Lee Holt, then City Attorney for the City of Dallas, were made class representatives. (R. Vol. I at 204-5). The State of Texas filed a four-page response to a notice of the suit (R. Vol. I at 79-82), but did not intervene or take an active role in the defense of the statute. (Affidavit of Joseph G. Werner; App. 1).

The Texas Attorney General was designated as an "associate" counsel on behalf of the defendant-class; however, Assistant City Attorney Joseph G. Werner was designated as the "lead class

counsel for the defendant-class." (R. Vol. I at 204).[2] The State, by and through the Attorney General, prior to the District Court's memorandum opinion, filed only one pleading: "Response of the State of Texas"—July 9, 1980 (R. Vol. I at 79-82)."[3] The State, by and through the Attorney General, did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; did not participate in trial strategy for the defendant-class; and, after initially filing a notice of appeal, withdrew the appeal.[4] Although the class representatives for the defendant class offered evidence at trial and examined witnesses, the State, by and through the Attorney General, was noticeably silent. (R. Vol. VII, 1 - 283 (Transcript of Proceedings)).

The trial court issued its memorandum opinion on August 17, 1982. After discovery and a hearing on plaintiff's attorneys fees in which it was discovered that the Texas Human Rights Foundation, and not the plaintiff, was the real party-plaintiff in interest in this action, the trial court entered its final judgment on Sep-

[2]The State, by and through the Attorney General, did not actively participate in the defense of the statute at either the trial court level or the Fifth Circuit level.

[3]The Response was filed only on behalf of the State of Texas; not the defendant-class. The State of Texas has never filed a pleading seeking to defend the defendant-class selected by the plaintiff. The Attorney General has done little or nothing to defend the constitutionality of §21.06 and has consistently objected to and interferred with Hill's defense of the statute in his official capacity and as the representative of the defendant-class.

[4]Nothing in the record indicates that the Attorney General ever purported to voluntarily represent the interest of the defendant-class. The Attorney General's action in withdrawing his appeal was done solely on behalf of the State, not on behalf of the individual defendant-class members or the defendant-class itself. The confusion which the Attorney General has created in the Fifth Circuit and before this Court is a result of his failure to recognize that his own pleadings and admissions before the various courts that have heard this case confirm that at no time did the Attorney General give any representation to the defendant-class. Hill is the only representative of the class.

tember 30, 1982.[5] The final judgment of the district court declared that §21.06 of the Texas Penal Code was in violation of the constitutionally protected right of privacy and equal protection.

The district court permanently enjoined the enforcement of §21.06 and expressly made the judgment binding on "the named defendants Muncy and Wade, as well as on the members of the class certified by this Court" (R. Vol. IV at 808). The trial court further expressly stated that "such defendants (Muncy and Wade) and all class members are permanently enjoined from enforcing the statute." (R. Vol. IV at 808).[6]

The district court's final judgment directly impaired and prejudiced Hill's legal power as a state official to enforce criminal laws. Hill's interest and his impairment of that interest by the district court's judgment "cannot be questioned." *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985)(*en banc*).

The designated class representatives, Henry Wade and Analeslie Muncy (substituted for Lee Holt), did not appeal the district court's adverse judgment against the defendant-class. No reason or excuse for the class representatives' failure to appeal has ever been offered.[7] Neither class representative, Wade or Muncy,

[5]At the attorneys fee hearing following the court's memorandum opinion, the plaintiff's counsel, James Barber, admitted that: "We were initially contacted by a non-profit corporation called the Texas Human Rights Foundation about litigating this issue, and we did enter into a contract with them . . . ." (R. Vol. VI at 48).

[6]The Original Complaint filed by the plaintiff did not include a request for injunctive relief against the individual defendant-class members or the defendant-class, (R. Vol. I at 1—6), and Baker admits in his Petition for Writ of Certiorari to this Court that no injunctive relief was requested. Petition for Certiorari (of Baker) No. 85-1225, at 4 n.4. However, Baker sought injunctive relief in the Pre-Trial Order. (R. Vol. II at 338). Thus, Baker misleads the Court by saying he never sought an injunction.

There is no indication in the record that the individual defendant-class members were ever given notice that the plaintiff was seeking an injunction against them in their official capacities. Nevertheless, the district court enjoined the individual defendant-class members from enforcing §21.06.

[7]Neither original class representative discussed or communicated their reasons for failing to appeal with the members of the defendant-class.

gave any member of the defendant class notice of either (i) the district court's final judgment and memorandum opinion, or (ii) the class representatives' decision not to appeal on behalf of the defendant-class. Nevertheless, on October 28, 1982, Hill filed a timely Notice of Appeal. On November 1, 1982, the same date as the Texas general election and the last day on which a Notice of Appeal could be filed on behalf of the State, Mark White, then Attorney General, filed a Notice of Appeal on behalf of the State.[8]

On November 1, 1982, Jim Mattox was elected as the new Attorney General for Texas. Without notice to any member of the defendant-class (except Hill), on March 9, 1983, Mr. Mattox informed the Fifth Circuit by letter that he was withdrawing the State's Notice of Appeal.[9] (App. 2). On March 18, 1983, the Attorney General formally filed a Motion to Withdraw the State's Appeal.[10] (App. 3) On April 12, 1983, shortly after the Texas Supreme Court's denial of a writ of mandamus to the Attorney General to pursue the appeal on behalf of the State, Hill filed a motion in the district court to intervene and be substituted as the class representative. Additionally, on July 5, 1983, Hill filed a motion to intervene and be substituted as class representa-

[8]The Attorney General's Notice of Appeal was filed only on behalf of the State of Texas; not on behalf of the individual defendant-class members or the defendant-class.

[9]In the Attorney General's letter to the Fifth Circuit, he acknowledged that Hill was an appellant and that the Fifth Circuit should "be hearing directly from [Hill's] office as to his intentions with respect to a continuation of the appeal on behalf of his office." (App. 2.)

[10]The Motion to Withdraw was made only on behalf of the State. There is no indication in the Motion to Withdraw that the Attorney General was withdrawing the appeal on behalf of the defendant-class members or the defendant-class. In fact, the Attorney General acknowledged Hill as a party by certifying a Certificate of Service to him on the Motion to Withdraw.

Shortly after Mr. Mattox withdrew the State's appeal, a mandamus action was filed in the Supreme Court of Texas to compel the Attorney General to pursue the appeal to the Fifth Circuit.

In the Attorney General's response to the mandamus action, he stated to the Texas Supreme Court that: "Petitioner Hill has already filed a timely notice of appeal in the Fifth Circuit of the very decision they seek to have appealed." The Texas Supreme Court denied the mandamus.

tive in the Fifth Circuit. On August 16, 1983, the Fifth Circuit granted Hill's motion to intervene and be substituted as the class representative. (App. 4). Although the panel decision overruled Hill's intervention, it did not set aside Hill's designation as the class representative on appeal. The *en banc* court reversed the decision of the panel. Neither the State nor Baker have petitioned this Court for review of the Fifth Circuit's order substituting Hill as the class representative. Hill, as he comes before this Court, is the class representative of the original defendant-class.

On April 3, 1984, approximately two weeks prior to the oral argument before the Fifth Circuit panel, the district court denied Hill's motion to intervene and wrote an extensive supplemental opinion. On April 17, 1984, Hill and Baker orally argued the case before a panel of the Fifth Circuit. Neither the Attorney General nor the State participated in the oral argument or briefing to the Fifth Circuit panel.

On September 21, 1984, the Fifth Circuit panel dismissed Hill's appeal. The panel opinion totally ignored Hill's standing as a party, as a member of the defendant class that had been enjoined, and as the class representative on appeal. The panel failed to discuss or analyze under what circumstances a member of a defendant-class can bring a meritorious appeal of an adverse judgment against the class when the class representatives fail to appeal. Instead, the panel decision focused entirely upon the "propriety of Hill's intervention." The panel erroneously presumed that the Attorney General was an adequate representative of the interest of the State and that only the interest of the State was involved in the appeal. The panel analyzed Hill's position as if he were a third-party totally unrelated to the proceeding.

On October 10, 1984, Hill filed a Petition for Rehearing En Banc and a Petition for Rehearing Before the Panel. On January 28, 1985, Hill's Petition for Rehearing En Banc was granted by the Fifth Circuit. On February 20, 1985, the State filed a letter with the Fifth Circuit requesting permission to re-intervene in the case as a party as a matter of right or to appear as amicus curiae. (App. 5).

On March 4, 1985, the Fifth Circuit ordered that in view of the fact that the Attorney General had once intervened in the case and then dismissed his appeal, he was directed to file a brief which "shall include a resume of the procedural history of the case and address the question of whether the State now has a right to intervene in an appeal in which the State's Attorney General once dismissed." (App. 6).[11]

On March 29, 1985, the Attorney General filed a Brief of the State of Texas on Rehearing En Banc. No order granting intervention was ever entered. At the oral argument on June 17, 1985, the Attorney General was permitted to argue against the appeal of Hill and in favor of Baker. On August 26, 1985, the *en banc* Fifth Circuit determined that Hill had standing to appeal the judgment of the district court. A majority of nine of the sixteen judges on the *en banc* court opined that Hill's standing to appeal was valid. Seven judges opined that Hill's appeal should be dismissed.

The *en banc* Fifth Circuit went on to review the district court's judgment on the merits and concluded that this Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), was binding on the lower courts and that the lower courts should "refuse to speculate" about what this Court may do on this issue today.[12] Judge Goldberg wrote a separate dissenting opinion with respect to the right of privacy and equal protection issues. None of his fellow six dissenters joined Judge Goldberg in his dissent on the merits. Of the sixteen judges that reviewed the merits

[11]The Attorney General was also invited to address the constitutionality of the statute and the authority of the Attorney General to represent the State in the case. There have been no further orders by the Fifth Circuit with respect to the Attorney General's letter of February 20, 1985 or the Attorney General's participation in the case.

[12]The *en banc* court also held that homosexuals do not constitute a suspect or quasi-suspect class and that, therefore, the standard of review is whether §21.06 is rationally related to a legitimate State end. 769 F.2d at 292-93. The court held that in view of the strong objection to homosexual conduct which has prevailed in Western culture for the past seven centuries, §21.06 was a valid exercise of State powers and, consequently, constitutional. 769 F.2d at 292.

of Baker's claim, only one saw fit expressly to reject the *en banc* court's holding that §21.06 met all challenges and was constitutional. On September 9, 1985, Baker filed a Petition for Rehearing En Banc.[13]

Baker, the State, the Attorney General, and the Fifth Circuit panel all failed to realize that Hill does not now, and has never, purported to represent the State. Hill has consistently asserted his due process right to appeal an adverse judgment against him in his individual capacity as a district attorney and member of the defendant-class, and, now, as the representative of the defendant-class on appeal. The Petitioners mislead this Court by implying that Hill has attempted to represent the State of Texas. He has not. Hill only desires to represent his interest as a member of the defendant-class and, equally, the interest of the defendant-class as a whole. The State, if it was ever truly a party to this action, is separate and distinct from Hill and the defendant-class.

REASONS FOR GRANTING THE CROSS-PETITION

Hill requests that the Court grant the Cross-Petition only in the event that the Court grants Baker's Petition for Writ of Certiorari in No. 85-1225 or the State's Petition in No. 85-1251.

I.

THE FIFTH CIRCUIT ERRED IN CONCLUDING THAT BAKER HAS STANDING TO PROSECUTE THE PRESENT ACTION

The issue of standing is one with which this Court has dealt, and continues to deal, on a regular basis. Therefore, an extensive

[13]On October 23, 1985, the *en banc* Fifth Circuit denied Baker's Petition for Rehearing En Banc. The Court noted that "nine of the sixteen participating judges joined in [the decision that Hill was entitled to intervene and pursue the appeal]. Seven judges dissented on the procedural ground that Hill was not entitled to intervene and prosecute the appeal. [However], only one dissenting judge wrote further to say that if he were to reach the merits, he would hold the Texas statute unconstitutional." (Baker Appendix at 135a).

recitation of principles applied by the Court in dealing with standing issues is unnecessary. Suffice it to say that this Court has uniformly required those who seek to invoke the jurisdiction of the federal courts to satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). To support this requirement, a litigant must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Abstract, imaginary or speculative injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct or statute, and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothectical" or "imaginary or speculative." *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Allen v. Wright*, ___ U.S. ___ 82 L.Ed.2d 556, 104 S.Ct. 3315 (1984); Younger v. *Harris*, 401 U.S. 37 (1971); *Golden v. Zwickler*, 394 U.S. 103 (1969); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

Although standing questions must be resolved on a case by case basis, nevertheless, as Justice O'Connor noted in *Allen v. Wright*, 82 L.Ed. 2d, at 570, "[l]ike most legal notions, the standing concepts have gained considerable definition from developing case law. In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." Consequently, in the present action, standing may be evaluated by determining where on the factual continuum between *Younger v. Harris* and *Steffel v. Thompson*, 415 U.S. 452 (1974), the facts concerning Baker fall.

In *Younger*, the Court held that three plaintiffs who had never been arrested, threatened with arrest, indicted, or threatened with prosecution lacked standing to sue because their complaint

alleged only that they were inhibited in their desire to distribute handbills by a statute which they challenged on constitutional grounds. The Court concluded that absent threatened or actual prosecution or likelihood of prosecution, plaintiffs' fears concerning prosecution were "imaginary or speculative." However, the Court determined that a fourth plaintiff who had actually been indicted under the challenged statute had standing to prosecute a constitutional challenge to that statute.

In *Steffel*, a plaintiff challenged a Georgia criminal statute pursuant to which he was personally warned and threatened with arrest on two separate occasions. Further, one of his companions continued to distribute handbills in violation of the statute and was arrested. The Court concluded that the plaintiff need not subject himself to actual arrest to have standing when a credible, personal threat of immediate arrest and prosecution existed.

A recent in-depth discussion of the analysis to be applied to standing questions raised by the present action may be found in *Lyons*, 461 U.S. 95 (1983), and *Allen*, 82 L.Ed.2d 556 (1984). In these cases, the Court clearly articulated the "immediacy and reality" which must be present to confer standing to pursue claims for declaratory and injunctive relief. In *Lyons*, the Court concluded that standing was absent in a situation in which the plaintiff had in the past suffered substantial physical injury from the conduct which he challenged as unconstitutional. Nevertheless, assertions that Lyons might again in the future be subject to the illegal conduct were determined insufficient to create the actual controversy that must exist for declaratory or injunctive relief to be entered. 461 U.S. at 104-105.

Further, as the Court noted in *Allen*, 82 L.Ed.2d at 573, to the extent a "stigmatic injury" is alleged to provide a sufficient basis for standing, some concrete interest with respect to which the claimant has suffered actual, personal injury must be established. Additionally, the causation component of the standing doctrine must be satisfied, demonstrating that the injury alleged is fairly

traceable to the conduct or statute challenged as unlawful. 82 L.Ed.2d at 573 Baker's allegations concerning "stigma" clearly do not meet these requirements.

Baker brought an action seeking equitable relief—a declaration that a criminal statute of the State of Texas is unconstitutional and an injunction against its enforcement. *See* Plaintiff's Original Complaint, R. Vol. I, at 1, and Pre-Trial Order, R. Vol. II at 338. In his complaint, Baker alleges that he is a practicing homosexual, who regularly engages in private homosexual acts and will do so in the future, and who, because of the existence of §21.06, is in constant fear of criminal prosecution, fear of loss of his job and livelihood, interference with and "chill[ing]" of "[h]is personal, private sex life" and faces "potential loss of his apartment lease and some friends and business associates if convicted of a violation of this statute, because of social stigma of such a conviction." R. Vol. I, at 2. The record below establishes that Baker has engaged in private, consensual conduct at his home or residence in violation of §21.06 since at least 1975, and that he intends to continue to engage in such conduct regardless of the outcome of this case. R. Vol. at 155, 184. Baker has never been personally threatened with, or actually suffered, arrest, indictment, prosecution, conviction, adverse employment action[14] or adverse action having demonstrable economic impact upon him as a result of enforcement of §21.06. Indeed, Baker was recruited to bring this lawsuit by the Texas Human Rights Foundation which also agreed to pay his attorney's fees.

Although violations of §21.06 have been prosecuted in the past, and it was stipulated that Baker and other homosexuals would be prosecuted under §21.06 if "*provable*" violations of the law came to the attention of enforcement authorities, there is no evidence that an actual or threatened arrest, indictment or prosecution has ever occurred under §21.06 involving persons engaged in homosex-

[14]Indeed, Baker has voluntarily left his position as a school teacher and has taken a new job. There is no evidence, despite substantial notoriety resulting from this case, that Baker has suffered or will suffer any threat to his present employment from §21.06.

ual conduct in a home, residence or other private dwelling—the only setting in which Baker alleged or testified he had, or would, ever engage in such conduct.[15]

The remoteness or implausibility of actual arrest and prosecution of Baker in this setting is established by uncontroverted testimony that a prerequisite to prosecution of Baker or anyone else under §21.06 is the existence and willingness to testify of a third-party witness to the violation who did not participate in the illegal conduct. *See Baker v. Wade*, 553 F. Supp. 1121, 1126, 1146 (1982). Thus, there is no credible or real threat that a "provable" violation will occur and, further, that Baker will be the subject of any prosecution.

In the present case, the standing requirements articulated by this Court are not met by Baker. Baker has neither alleged nor proven any actual injury which is sufficient for standing purposes. Indeed, his alleged fears of injury resulting from application of §21.06 to him have not even deterred his continuing action in violation of the statute, a significant fact to consider when weighing the "immediacy and reality" of Baker's fears and whether they are "imaginary or speculative." He allegedly fears that which has never previously occurred in Texas—arrest or prosecution under §21.06 for homosexual conduct in the privacy of a home or residence. *See, e.g.*, 415 U.S. at 452.

It is not enough that someone else in other circumstances might be prosecuted or suffer some injury or detriment from the en-

[15]The Court may well wonder if §21.06 is not enforced in circumstances about which Baker has complained (*i.e.*, private, consensual actions in the privacy of a residence or dwelling) why the statute should be protected at all. Section 21.06 serves an important enforcement function which bridges the gap between illegal conduct which has been held to be public, and thus controlled by Section 21.07 (Public Lewdness) and conduct in which the participants have an expectation of privacy as that concept has been defined by the highest court of criminal review in Texas (the Court of Criminal Appeals), in such circumstances as bars, bath houses, parks, etc. *See, e.g., Liebman v. State of Texas*, 652 S.W.2d 942 (Tex. Crim. App. *en banc* 1983). The statute has never been used to invade the privacy of a home or private residence; and, there have been no implications of violation of Fourth Amendment protections.

forcement of §21.06. Baker must establish the immediacy and reality of an actual, direct and personal injury or threatened injury fairly, casually related to enforcement of the allegedly unconstitutional law. This Baker cannot do. The Court should avoid the determination of social policy in abstract, hypothetical situations such as the present one.

II.

THE FIFTH CIRCUIT ERRED IN PERMITTING THE ATTORNEY GENERAL TO REENTER THE CASE ON HEARING *EN BANC*.

A. The Attorney General of Texas Voluntarily Withdrew The State's Appeal and Ceased To Be a Party.

By letter dated March 9, 1983 (App. 2), the Attorney General withdrew the State's appeal in this case. In that letter, the Attorney General acknowledged the appeal of Hill and referred the court to Mr. Hill's office to determine his intentions to continue his pursuit of the appeal. Thereafter, on March 18, 1983, the Attorney General filed a formal Motion to Dismiss the appeal on behalf of the State. (App. 3). The State's voluntary withdrawal estops the State from later participating in the same case. The State should not be allowed to vacillate in and out of cases at the whim of the Attorney General. The State, in its brief to the Fifth Circuit pursuant to the Order of March 4, 1985 (App. 6), failed to cite any statutory or case authority which permits the State to withdraw from a case and then re-intervene either as a matter of right or discretion. The Fifth Circuit erred, if it did so, in permitting the State to re-intervene either as a party or as an amicus curiae after having voluntarily withdrawn the State's appeal.[16]

[16]It seems clear from the record that the Fifth Circuit did not allow the State to re-intervene as a party or to participate merely as an *amicus curiae*. Judge Clark's order of March 29, 1985 required the State to establish the authority for the State's re-intervention. The State never filed a formal motion to intervene or to participate as an amicus

(Footnote continued on next page)

B. The State Has Judicially Admitted Its Withdrawal and Refusal to Participate in The Appeal of this Case.

In response to a mandamus action, the Attorney General judicially admitted to the Texas Supreme Court that the State was not, and did not intend to be, a party to this action. *Baker*, 769 F.2d at 291. The Attorney General further judicially admitted the standing of Hill to appeal this case. 769 F.2d at 291. Thereafter, the Attorney General took a totally inconsistent position on Hill's standing before the *en banc* Fifth Circuit. The judicial inconsistencies of the Attorney General's position with respect to both (i) Hill's standing, and (ii) the Attorney General's desire to prosecute the appeal for the State, judicially estops the Attorney General from taking a totally inconsistent position before this Court. The Attorney General has further judicially admitted that the State was not an appellant before the *en banc* court by filing the Brief of the State of Texas on Rehearing En Banc with a *green* brief cover.[17]

C. The Fifth Circuit's Implicit Permission Allowing the State to Intervene as a Party, or Participate as An *Amicus Curiae*, at the *En Banc* Level Was Improper and Untimely After the State Voluntarily Withdrew Its Appeal and Ceased to be an Appellant.

By letter dated February 20, 1985, the State, by and through the Attorney General, requested that the State be permitted to in-

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(Footnote continued from previous page)
curiae in the *en banc* argument. There was no formal order entered by the Fifth Circuit with respect to the State's participation before the *en banc* court. The State would have no grounds to bring a Petition for Writ of Certiorari to this Court if the State were not a party below, and Hill maintains that the State never gained party-intervenor status at the *en banc* level and thus cannot properly appear before this Court as a Petitioner. However, these issues are raised in the event that the Court determines that the State obtained party status below in some fashion.

[17]Federal Rule of Appellate Procedure 32(a) provides that "the cover of the brief of an intervenor or amicus [shall be] green."

tervene as a party as a matter of right, or to intervene as a party pursuant to "42 [sic] U.S.C. §2403(b)," or for leave to appear as an *amicus curiae.* (App. 5). The Fifth Circuit ordered the State to file a brief establishing the authority of the State to reenter the case at this stage of the proceedings. No subsequent order was entered by the Fifth Circuit allowing the State to (i) intervene as a party as a matter of right; (ii) intervene pursuant to 28 U.S.C. §2403(b); or (iii) appear as an *amicus curiae.* Nevertheless, the State was allowed to participate in the oral argument and to file a brief opposing Hill's appeal. Although Hill denies the State was granted permission to intervene, the silence of the Fifth Circuit with respect to the request of the State might be interpreted to implicitly mean that the request of the State was granted. If so, Hill urges the Court to reverse that implicit finding because of a total lack of authority for a party to (i) intervene in an action, (ii) affirmatively and voluntarily withdraw from that action, and (iii) then reenter the case at a subsequent appellate level. There is no authority for such actions by the State, and the Fifth Circuit's implied permission, if any, was improper.

D. If The Court Concludes That the Fifth Circuit Implicitly Granted the Attorney General's Informal Request to Intervene on *En Banc* Appeal, Such Implicit Grant Was Erroneous.

The Attorney General and the State were never expressly granted leave to intervene at the *en banc* level under any statute or rule, thus, the Attorney General's posture was, at best, that of a would-be *amicus curiae.* If this Court should determine, however, that the Fifth Circuit implicitly granted the Attorney General's informal request to intervene, then Hill urges that such implicit grant was erroneous and should be reversed.

In response to the Fifth Circuit's March 4, 1985, Order (App. 6), the Attorney General submitted his March 29, 1985, "Brief of the State of Texas on Rehearing En Banc" (hereinafter the "State's Brief"), in which he requested permission to intervene

under 28 U.S.C. §2403(b), State's Brief at 11-13, or, alternatively, under a theory of "permissive intervention." The State cited no authorities for "permissive intervention."[18] Under either §2403(b) or any permissive intervention rule, intervention by the Attorney General at the *en banc* appellate stage of this case was improper and constitutes reversible error.

1. *Section 2403(b) Intervention.* In addition to the waiver, estoppel, laches, and admission arguments against the Attorney General's intervention at the *en banc* stage, this case does not satisfy the facial requirements of §2403(b) or the case law requisites established by this Court and lower courts for §2403(b) intervention.[19]

a. *Was an officer or employee of the State already a party?*

First, the Attorney General may not intervene because an officer or employee of the State is already a party. Baker sued by name the District Attorney of Dallas County and the Dallas City Attorney. He also sued the class of all District, County, and City Attorneys in Texas. Under the Texas constitution and statutes, all of these positions constitute "state officers."[20] The Texas Supreme Court

[18]State's Brief at 13. The failure to cite authorities directly contravened the Fifth Circuit's March 4, 1985 order requiring assertion of "the basis on which intervention is sought."

[19]Section 2403(b) states:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence . . . and for argument on the question of constitutionality.

[20]Hill and the other members of the defendant-class are officers charged with enforcing the criminal laws of the State. *Baker*, 743 F.2d at 241 n.21 (panel opinion). The *en banc* opinion itself expressly holds that Hill is "a proper official under Texas law to represent the state," "a state official," and "the state officer." 769 F.2d at 291, 292. The Texas constitution provides that all district and county attorneys "shall represent the State" in all cases in their district and county. Tex. Const. art. 5, §21. Likewise, district attorneys and county attorneys "shall represent the State in all criminal cases" in their respective courts and in all appeals therefrom. Tex. Code Crim. Proc. Ann. art. 2.01, 2.02 (Supp. 1982).

has held that the district attorney is the "proper representative of the State" in certain actions in which the remedy "belongs to the state . . . to protect the interests of the people as a whole," *State v. Gary*, 163 Tex. 565, 359 S.W.2d 456, 458 (1962), and that in such actions the attorney general does not have power to act, *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191, 195 (1955).[21]

The legislative history and cases interpreting §2403(b) confirm that the original defendants, including Hill, are state officers. The 1976 amendments to the Three Judge Court Act, Pub. Law 94-381, added §2403(b) to Title 28 of the United States Code.[22] In *Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935), this Court adopted a two-prong test to determine if the defendant is a "state officer": (1) what is the nature of the legislative action assailed; and (2) what is the function of the officer who is sought to be restrained. 295 U.S. at 94. The first prong is satisfied if the statute is "of general application" or of statewide concern. 295 U.S. at 94. It is undisputed that §21.06 is of "general application" and of statewide effect. *Baker*, 743 F.2d at 242. Thus, the first prong of the *Spielman* test is met.

The second prong is met if the officer is charged with the "duty of enforcing the statute in the interests of the state and not simply in the interest of the locality where he serves." 295 U.S. at 94. Hill and the other members of the defendant-class are officers charged with enforcing the criminal laws of the State. The second

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[21]Indeed, Baker has admitted that at the trial court level, "the State felt that its interest was adequately represented by the Dallas City and District Attorney's offices," Appellee's Supplemental Brief on Rehearing En Banc (hereinafter "Baker's En Banc Brief") at 4. This is an admission that these two named defendants were state officers representing state interests.

[22]The Senate Report on Pub. Law 94-381 defines "state officer" as "local officers performing a State function that embodies a policy of statewide concern." S. Rep. No. 94-204, 94th Cong., 2d Sess. 5 (1975), *citing Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935).

prong of *Spielman* is met.[23] Thus, under both federal and state law, the original defendants, the defendant-class and Hill are "state officers." Therefore, the Attorney General cannot intervene under §2403(b).

b. *The State may intervene only to support the constitutionality of the statute.*

The Attorney General may only be permitted "to intervene . . . for argument *on the question of constitutionality*."[24] Consequently, any action of the Attorney General other than addressing, affirming, and defending the constitutionality of §21.06 would be null and void and could not serve as grounds for intervention under §2403(b).

The Attorney General has repeatedly disavowed, both explicitly and implicitly, any intention to address or support the constitutionality of §21.06.[25] Moreover, the State's Brief, at 11, specifically admits that the State sought intervention on appeal only "to defend his (the Attorney General's) exclusive right to represent

[23]Recent federal cases confirm that state prosecuting attorneys are "state officers" for purposes of §2403(b) and that, therefore, the state attorney general may not intervene. *See e.g., Sovereign News Co. v. Falke*, 448 F. Supp. 306, 314 (N.D. Ohio 1977), *remanded on other grounds*, 610 F.2d 428 (6th Cir. 1979), *further remanded on other grounds*, 674 F.2d 484 (6th Cir. 1982); *Spring v. Caldwell* , 92 F.R.D. 7, 9-10 (S.D. Tex. 1981), *reversed on other grounds* , 692 F.2d 994 (5th Cir. 1982). *See also* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §4235, at 401-02 (1978).

[24]*Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982), *citing Smolowe v. Delendo Corporation* , 36 F.Supp. 790, 792 (S.D.N.Y. 1940). *See also New York v. Uplinger*, 104 S.Ct. 2332, 2333 n.1 (1984) (Court considers relevant a state Attorney General's views on "*the constitutionality* of a statute with state-wide application")(emphasis added).

[25]In response to the Attorney General's February 20, 1985, letter to the Fifth Circuit requesting intervention at the *en banc* stage (App. 5), Hill's counsel telephoned the Attorney General, who admitted that he sought to intervene only to address the issue of Hill carrying forward the appeal and that he would not address the constitutionality of §21.06. *See* February 25, 1985, Letter of Hill's Counsel to Fifth Circuit (App. 7).

the State's interests before this Court."[26] Indeed, the Attorney General's Petition to this Court (No. 85-1251) fails to address the issue of the constitutionality of §21.06.[27] For all of these reasons, the Attorney General has failed to meet any of the prerequisites of §2403(b) intervention, and the Fifth Circuit should have expressly denied his request to intervene or participate at all in the appeal.

2. *Permissive Intervention.* The only other arguable method available to the Attorney General for his requested "permissive intervention" would be pursuant to Rule 24(b) and (c) of the Fed. R. Civ. P.[28] If this Court finds that the Fifth Circuit implicitly granted the State permissive intervention under Rule 24(b) and (c), such action was improper and constitutes reversible error because the purported intervention was not timely, does not raise a question of law or fact in common with the main action, and it would prejudice the rights of Hill and the defendant-class.[29]

Because, the Attorney General failed to meet any of the requirements for permissive intervention or §2403(b) intervention, he should not be allowed to participate at any level of this appeal.

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[26]The State's Brief studiously avoids addressing the constitutionality of §21.06, even though the Fifth Circuit's March 4, 1985 order explicitly invited the Attorney General to brief that issue.

[27]The outcome of the Attorney General's prolonged effort in this case to preclude Hill and the defendant-class from exercising their proper rights and powers of appeal, if it were successful, would be not to support the constitutionality of §21.06 but to acquiesce in the trial court's finding of its invalidity.

[28]Neither his February 20, 1985, letter nor his March 29, 1985, brief to the Fifth Circuit cites or relies on this rule for his requested intervention. Consequently, the Attorney General has waived any ability, and is estopped, to claim such grounds for intervention.

[29]The record herein clearly demonstrates that the Attorney General never filed a formal motion to intervene accompanied by any specific pleading "stating the grounds therefor" nor was any formal order ever entered on the Attorney General's informal intervention request. Failure to comply strictly with Rule 24(c)'s conditions for intervention should result in denial of the intervention request. *See Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326 (9th Cir. 1977).

The Fifth Circuit's implied permission to participate was erroneous.

E. Baker's "Real Party in Interest" Claims are Misplaced Under Rule 17 and Have Been Waived Under Rule 9. The Fifth Circuit Should Have Dismissed the Attorney General from the Case Because He Was Not the Real Party in Interest.

Baker claims that the State is "the real party in interest in this case," Baker's Petition at 11 and Baker's En Banc Brief at 7, 22. Baker confuses the concepts of "real party in interest" and "capacity to be sued," and his reasoning is premised upon an inappropriate understanding of the "real party in interest" doctrine. The appropriate theory to be applied in the present case is the concept of "capacity to be sued."[30] The significance of this distinction is not mere semantics. Under Rule 9, Fed. R. Civ. P., when a party desires to challenge the capacity of another party to sue or be sued, he must do so by specific negative averment, and failure to do so at the trial court level constitutes a waiver of any right to later challenge the capacity of a party to participate in a

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[30]There is an important distinction to be drawn between these two concepts.

> As used in Rule 17(a), the real party in interest principle is a means to identify the person who possesses *the right sought to be enforced*. Therefore, the term directs attention to whether *plaintiff* has a significant interest in the particular action he has instituted. By way of contrast, capacity is conceived to be a party's personal right to litigate in a federal court. The issue is determined under Rule 17(b) and Rule 17(c) for all parties to the suit and is neither limited to plaintiffs, *as is the real party in interest concept*, nor dependent on the character of a specific claim involved in the litigation.

6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1541 (1978)(emphasis added). *Accord*, 3A J. MOORE, MOORE'S FEDERAL PRACTICE §17.07 (1985). Although, as the commentators point out, other courts have also confused the concept of real party in interest in connection with other defendants, the real party in interest rule applies only to plaintiffs, not to defendants.

lawsuit.[31] The record reflects that Baker made no objection or claim before the trial court that the Attorney General was the "real party in interest." Since Baker failed to object or aver prior to judgment that Hill was an improper party, Baker has waived that right. Moreover, since the appropriate issue to be resolved is whether the class of which Hill is a member had the capacity to defend the suit, and since no challenge was made at the trial court level concerning the class' capacity, this issue has been waived by Baker and may not be raised now.

III.

THE ATTORNEY GENERAL WAS NOT A PROPER PARTY-INTERVENOR AT THE TRIAL COURT LEVEL, AND THE FIFTH CIRCUIT SHOULD HAVE DENIED THE ATTORNEY GENERAL'S PARTICIPATION ON THAT GROUND.

A. Section 2403(b) Intervention.

Hill argued to the appellate court that since the Attorney General's original attempted intervention at the trial court level was improper, he had no standing to represent the interests of either the State or the true defendant-class at trial or on appeal. The Fifth Circuit did not expressly rule on this point. Initially, neither the State nor the Attorney General are proper intervenors at trial pursuant to §2403(b) because the defendants, all district, county and city attorneys in Texas, are officers of the State.[32]

Second, because the Attorney General did not actively present evidence and argument in support of the constitutionality of

[31] *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975); *Marks v. Brucker*, 434 F.2d 897 (9th Cir. 1970); *E. Brooke Matclack, Inc. v. Walrath*, 24 F.R.D. 263 (D.Md. 1959); *Ivey v. Daus*, 181 F. Supp. 793 (S.D.N.Y. 1960); *Davis v. Griffin - Spalding City, Georgia Board of Education*, 445 F. Supp. 1048 (N.D.Ga. 1975).

[32] The §2403(b) requisites have been addressed above in section II.D.1. hereof. Hill will not reiterate the grounds for this point here. The Attorney General did not meet these requirements at the trial level.

§21.06, neither the State nor the Attorney General should have been allowed to intervene at trial.[33] The Record indicates that although the City and District Attorneys for Dallas offered evidence at trial and examined witnesses, the Attorney General was silent.[34] In the face of this record, it cannot possibly be asserted that the Attorney General met the second prerequisite for §2403(b) intervention at the trial level.

B. Other Intervention.

The Attorney General made no attempt at the trial level to intervene under any statute or rule other than §2403(b). Thus, any claim to intervention under Rule 24(a),(b), or (c) or under any other theory has now been waived. Moreover, as explained above in Section II.D.2. hereof, the Attorney General could not possibly meet the Rule 24 intervention requirements, even at the trial level. Therefore, the Attorney General was never a proper intervenor at any stage of this case and has no standing to appear before this Court. Baker's claims to the contrary are groundless.

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[33]The record reflects that the trial court, by its order of June 3, 1980, notified the Attorney General of the pendency of this action and granted him leave to intervene under §2403(b). (R. Vol. I at 60) The Attorney General subsequently filed a four-page "Response of the State of Texas" on July 9, 1980 (R. 79), but took virtually no action after that date (Affidavit of Assistant City Attorney Joseph G. Werner, App. 1), except to file a notice of appeal (R. Vol. IV at 874-75) and later, a motion to withdraw appeal (App. 3). With the exception of filing the four-page "Response," the Attorney General did absolutely nothing to defend the constitutionality of §21.06. The Attorney General did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; did not participate in trial strategy for the defendant-class, (Affidavit of Joseph G. Werner, App. 1); and, did not offer any contentions or issues in the Pre-Trial Order (R. Vol. II at 338).

[34]Baker's explanation for the Attorney General's absence was a "lack of room" for the Attorney General at the counsel table. Baker's Brief on Rehearing En Banc Brief at 5.

IV.

IF THE RIGHT TO PRIVACY OR THE EQUAL PROTECTION CLAUSE APPLIES TO CONDUCT PROSCRIBED BY §21.06, COMPELLING STATE INTERESTS OF MORALITY, HEALTH, AND SAFETY JUSTIFY THE STATUTE

The *en banc* Fifth Circuit held that the right to privacy does not extend to homosexual sodomy, 769 F.2d at 292, and rejected Baker's equal protection argument. Thus, there was no necessity for the court to directly reach Hill's compelling state interest argument concerning the morality, health, and safety furthered by §21.06. *See Roe v. Wade*, 410 U.S. 113, 155 (1973). If the Court grants certiorari in this action, the compelling state interest must be addressed.

A. Morality and Decency: Homosexual Sodomy is Per Se Immoral and Indecent.

Morality and decency represent compelling state interests sufficient to uphold §21.06.[35] Federal courts have repeatedly held homosexual conduct immoral and indecent. This Court has determined that homosexuals constitute a "clearly defined deviate sexual group," *Mishkin v. New York*, 383 U.S. 502 (1966), and every federal court in Texas addressing the issue (except the trial court below) has held homosexual conduct to be contrary to the moral standards of Texas.[36] Several Texas state courts have determined that homosexual conduct is inherently immoral.[37] When the high-

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[35]*See Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Doe v. Commonwealth's Attorney*, *supra*.

[36]*Childers v. Dallas Police Department*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982); *In Re Longstaff*, 538 F. Supp. 589 (N.D. Tex. 1982), *aff'd*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984); *Cyr v. Walls*, 439 F. Supp. 697 (N.D. Tex. 1977); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds*, 401 U.S. 989 (1971); *Dawson v. Vance*, 329 F. Supp. 1320 (S.D. Tex. 1971).

[37]*Pruett v. State* , 463 S.W.2d 191, 195-96 (Tex. Crim. App. 1970), *appeal dism'd*, 402 U.S. 902, *rehearing denied*, 403 U.S. 912 (1971);

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est court of a state has given interpretation to its laws, federal courts are bound by that construction.[38]

B. Public and Private Health is Threatened by Homosexual Practices.

This Court has repeatedly found that the health of a state's citizens clearly constitutes a compelling state interest.[39] The specific conduct proscribed by §21.06 (homosexual oral and anal sodomy) unequivocally threatens the health of the individuals directly involved in such conduct and of the public at large. Homosexuals are a reservoir of serious transmissible diseases. Although only about four percent of the total U.S. population is homosexual or bisexual,[40] they carry a disproportionate incidence of sexually transmitted diseases ("STD's"): AIDS—73%[41]; male syphilis—49%[42]; hepatitis B—43%[43]; enteric diseases—53%[44]. Presently in

(Footnote continued from previous page)
Smith v. State, 490 S.W.2d 902, 907 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.) (act of homosexual sodomy constituted "unnatural acts" that amounted to "a crime of moral turpitude" and was "conduct contrary to the accepted and customary behavior between man and man and is contrary to the rule of decency and good morals").

[38]*Schad v. Borough of Mt. Ephriam*, 452 U.S. 61 (1981); *Gurley v. Rhoden*, 421 U.S. 200 (1975); *Welch v. State Dept. of Highways*, ____ F.2d ____, 54 U.S.L.W. 1126 (5th Cir. 1986) (*en banc*).

[39]*Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[40]A. BELL, M. WEINBERG & S. HAMMERSMITH, SEXUAL PREFERENCE: STATISTICAL APPENDIX 618 (1981); Cameron, Procter, Coburn et al., *Sexual Orientation and Sexually Transmitted Disease*, 70 NEB. MED. J. 292 (1985).

[41]Quinn, *Perspective on the Future of AIDS*, 253 J. AM. MED. A. 247, 248 (1985); Centers for Disease Control ("CDC"), *Update: Acquired Immunodeficiency Syndrome (AIDS)—United States*, 32 MORB. & MORT. WKLY. REP. 389 (1983).

[42]Bolan, *Sexually Transmitted Diseases in Homosexuals: Focusing the Attack*, 8 SEX. TRANSM. DIS. 293, 294 (1981); Henderson, *Improving Sexually Transmitted Disease Health Services for Gays: A National Prospective*, 4 SEX. TRANSM. DIS. 58, 60 (1977).

[43]Hansfield, *Sexually Transmitted Diseases In Homosexual Men*, 71 AM. J. PUB. HLTH. 989-90 (1981).

[44]Marmor et al., *Risk Factors for Kaposi's Sarcoma in Homosexual Men*, 1 LANCET 1083 (1982); William, *The Sexual Transmission of*

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Dallas County, Texas, 94.8% of all reported AIDS cases involve homosexuals.[45] It is now reasonably estimated that over 60% of all U.S. homosexuals have been exposed to the AIDS virus through their conduct,[46] and 94% of homosexuals are seropositive for cytomegalovirus (which is frequently associated with AIDS).[47] At least 66% of homosexual men admit to having had at least one STD.[48] Medical authorities identify two specific homosexual acts: anal sodomy[49] and oral sodomy,[50] responsible for the transmission of STD's among homosexuals. Thus, the precise conduct proscribed by §21.06 endangers the health of those individuals performing such acts.

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Parasitic Infections in Gay Men, 5 J. HOMOSEXUALITY 291-94 (1980); Dritz et al., *Patterns of Sexually Transmitted Enteric Diseases in a City*, 2 LANCET 3-4 (1977).

[45]Dallas County Hlth. Dept., *Dallas County AIDS Cases (1985)*, Dallas Morning News, Dec. 29, 1985, at 33A.

[46]Ho et al., *Recombinant Human Interferon Alfa-A Suppresses HTLV-111 Replication in Vitro*, 1 LANCET 602, 603 (1985); Quinn, *supra* at 247.

[47]Lange et al., *Cytomegalovirus Isolation From Healthy Homosexual Men*, 252 J. AM. MED. A. 1908 (1984); Drew et al., *Prevalence of Cytomegalovirus Infection in Homosexual Men*, 143 J. INFECTIOUS DIS. 188-92 (1981).

[48]Quinn et al., *The Polymicrobial Origin of Intestinal Infections in Homosexual Men*, 309 NEW ENG. J. MED. 576, 577 (1983); Darrow et al., *Gay Report on Sexually Transmitted Diseases*, 71 AM. J. PUB. HLTH. 1004 (1981).

[49]Sonnabend et al., *Acquired Immunodeficiency Syndrome, Opportunistic Infections, and Malignancies in Male Homosexuals: A Hypothesis of Etiologic Factors in Pathogenesis*, 249 J. AM. MED. A. 2370, 2371 (1983); Detels et al., *Relation Between Sexual Practices and T-Cell Subsets in Homosexually Active Men*, 1 LANCET 609 (1983); Darrow et al., *supra* at 1006; Quinn et al., *supra* at 582.

[50]Felman & Nikitas, *Sexually Transmitted Diseases in the Male Homosexual Community*, 30 CUTIS 706, 710 (1982); Jaffe et al., *National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia in Homosexual Men: Part I, Epidemiologic Results*, 99 ANNALS INTERN. MED. 145-50 (1983); Lange et al., *supra* at 1910.

The health of the general public is equaily threatened by homosexual practices because homosexuals represent the first link in the chain of disease transmission to the public. Many of the diseases, such as hepatitis A, may be transmitted through contaminated food and water. More significant, however, is the now-proven mode of transmission of hepatitis B and AIDS through blood, blood products and transfusions.[51] Texas remains the fifth most seriously affected state in terms of AIDS cases.[52] Thus, §21.06 sustains the present challenge due to compelling health and safety interests.

V.

HILL'S BRANDEIS-BRIEF LEGISLATIVE-FACT EVIDENCE SHOULD HAVE BEEN FORMALLY ADMITTED AND CONSIDERED ON APPEAL

On Juiy 22, 1983, Baker certified service of his Motion to Stike Appendices to Brief for Appellant in the Fifth Circuit appeal. This issue was extensively briefed and counterbriefed during the appeal, but the only formal order given thereon was that the motion be "carried with the case for later ruling." (App. 4) Apparently, the Fifth Circuit implicitly denied Baker's motion and permitted Hill's Brandeis-brief material to be before the court. Neither the Fifth Circuit panel nor the *en banc* court directly referenced such material, however, and if this Court determines that Baker's motion was not implicitly denied or that the Fifth Circuit did not formally admit and consider such evidence, then

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[51]Quinn, *supra* at 247; Groopman et al., *Virologic Studies in a Case of Transfusion Associated AIDS*, 311 NEW ENG. J. MED. 1419 (1984). The experts studying AIDS have observed that "given . . . the potential for spread to other populations, the implications of the presence of this virus in a community are staggering," Landesman et al., *Special Report: The AIDS Epidemic*, 312 NEW ENG. J. MED. 521, 522 (1985), and that "this illness now ranks as one of the most serious epidemics confronting man in modern time." Quinn, *supra* at 247.

[52]CDC, *supra* at 390.

the Fifth Circuit erred in failing to admit and consider Hill's Brandeis-brief material.[53]

Numerous courts have followed this Court's decision in *Muller v. Oregon*, 208 U.S. 41 (1908), and have approved of the use of briefing material to introduce extra-record medical, physiological, and sociological information.[54] The modern commentators agree: "The Brandeis Brief has not lost its usefulness in constitutional law, for it remains a device by which a large amount of data can be assembled, organized and presented for judicial consideration in digestible form."[55] Thus, Hill's legislative-fact evidence was properly presented to the Fifth Circuit and should be considered part of the record.

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[53]Hill's materials submitted in his brief's appendices consist primarily of general social, medical, sociological, and physical facts, studies, and data, almost identical to the extracts from over 90 reports of committees, bureaus of statistics and commissioners of hygiene included in the original "Brandeis brief" accepted by this Court in *Muller v. Oregon*, 208 U.S. 412 (1908). These types of materials constitute legislative facts, rather than adjudicative facts (which relate specifically to the activities of the litigants), and a court may refer to such legislative facts at any point in the litigation "whether or not those facts have been developed in the record." K. DAVIS, ADMINISTRATIVE LAW TREATISE §15.03, at 353 (1958). *Accord*, Fed. R. Evid. 201, Advisory Committee Notes to §§(a).

[54]*See, e.g., Rummel v. Estelle*, 445 U.S. 263, 277-78, 279-80 (1980) (expressly considering evidence presented in a vast appendix of charts and summaries); *Kahn v. Sherin*, 446 U.S. 351 (1974); *Garner v. Louisiana*, 368 U.S. 157, 194 (1961).

[55]Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 667 (1966). *Accord*, Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 53 (1960).

CONCLUSION

For these reasons, Respondents' Cross-Petition for Writ of Certiorari should be granted, but only if the Petition for Writ of Certiorari is granted in Actions No. 85-1251 or No. 85-1225.

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been mailed, by Certified Mail, Return Receipt Requested, to all attorneys of record on this 5th day of March, 1986.

/s/ WM. CHARLES BUNDREN
Wm. Charles Bundren